

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEE ROBINSON,

Defendant-Appellant.

UNPUBLISHED

May 25, 2004

No. 245265

Wayne Circuit Court

LC No. 02-002364

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant Willie Lee Robinson appeals as of right his jury trial convictions for felony murder,¹ armed robbery,² extortion,³ uttering and publishing,⁴ and possessing a firearm during the commission of a felony.⁵ Defendant was sentenced to life imprisonment for his felony murder conviction, fifteen to thirty years' imprisonment for his armed robbery conviction, seven to fourteen years' imprisonment for his extortion conviction, two to fourteen years' imprisonment for his uttering and publishing conviction, and five years' imprisonment for his felony-firearm conviction. We affirm.

The circumstances surrounding defendant's convictions arose from the kidnapping, robbery, and murder of Anthony Gates, a.k.a. Michael Smith. Defendant collaborated with others to rob and murder Mr. Gates to eradicate a drug debt. Following the murder, defendant transferred large sums of money from Mr. Gates's bank account at Credit Union One into his own personal account and wrote checks on that account.

¹ MCL 750.316(b).

² MCL 750.529.

³ MCL 750.213.

⁴ MCL 750.249.

⁵ MCL 750.227b.

I. Prosecutorial Misconduct

Defendant first argues that prosecutorial misconduct deprived him of a fair trial. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.⁶

On the second day of trial, before the jury had been seated, an assistant prosecutor visited the courtroom and remarked that special agent Ed Donovan, who was one of the prosecution's primary witnesses, was an excellent officer. Two jurors were in the courtroom and potentially heard the comment. The jurors were unaware of the assistant prosecutor's identity, and similarly, the assistant prosecutor was unaware that the jurors were present in the courtroom. Defendant contends that the assistant prosecutor's statement vouched for special agent Donovan's credibility.

Defendant correctly asserts that a prosecutor may not vouch for the credibility of a witness.⁷ However, the assistant prosecutor's statement concerned only the general quality of special agent Donovan's job performance, not his credibility.

Furthermore, the trial court took "appropriate steps to ensure that the jurors w[ould] not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court."⁸ Following the comment, the trial court instructed the jury that "other people's opinions should have no bearing on how you perceive things."⁹ The trial court also instructed the jury, both before the commencement and after the conclusion of the trial, that the lawyers' remarks did not constitute evidence. Finally, the trial court specifically instructed the jury before trial "that just because a witness might be a police officer doesn't mean that his or her testimony is more believable or less believable than the other witnesses."¹⁰ The trial court gave a similar instruction at the conclusion of the trial. Jurors are presumed to follow their instructions.¹¹ The trial court appropriately responded to the assistant prosecutor's comment. Any possible prejudice that may have resulted from the allegedly improper statement was cured by the trial court's instructions.

⁶ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

⁷ *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

⁸ MCR 6.414(A).

⁹ [Trial Transcript, June 6, 2002, p 9.]

¹⁰ [Trial Transcript, June 5, 2002, p 107.]

¹¹ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

II. Judicial Substitution

Defendant argues that he was denied his right to a fair trial when Judge Mary M. Waterstone was substituted for Judge Bruce U. Morrow during jury deliberations. Again, we disagree.

Generally, “a judge cannot finish the performance of a duty already entered upon by his predecessor where that duty involves the exercise of judgment and the application of legal knowledge to, and judicial deliberation of, facts known only to the predecessor.”¹² A single judge should preside over an entire proceeding. A substitute judge should not preside over a portion of an ongoing trial.¹³ The purpose of the rule against substitution is to ensure that the judge who hears the testimony regarding the facts also applies the law to those facts.¹⁴ However, a judge may be substituted for another judge in the case of death, sickness, or other disability if the substitute judge certifies that he or she has become familiar with the record of the trial.¹⁵ A defendant is not entitled to automatic reversal of his conviction upon a showing that a judge was substituted without familiarity with the case.¹⁶ The defendant must show prejudice or the substitution will be deemed harmless error.¹⁷

Judge Morrow presided over jury selection, opening statements, the trial, closing arguments, and jury instructions. Judge Waterstone substituted for Judge Morrow for one day, presiding only over the second day of jury deliberation, the verdict, and the polling of the jury.¹⁸ That day, the jury sent a note to the court requesting “[m]ore clarification of difference between first and second degree murder.” However, before Judge Waterstone had the opportunity to respond to the jury’s request, the jury returned with a verdict.

Defendant contends that he was prejudiced by this substitution, as Judge Waterstone failed to respond to the jury’s request for clarification before the jury reached its verdict; and therefore, the jury was not properly instructed. Reversal is not required, however, if the instructions in their entirety fairly presented the issues to be tried and sufficiently protected the defendant’s rights.¹⁹ The trial court gave the standard jury instructions for first-degree felony murder²⁰ and second-degree murder.²¹ Examined as a whole, the jury instructions fairly

¹² *People v McCline*, 442 Mich 127, 133; 499 NW2d 341 (1993), quoting *State v Johnson*, 349 P2d 227 (Wash, 1960).

¹³ *Id.* at 132, 134.

¹⁴ *Id.*

¹⁵ MCR 6.440(A); *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995).

¹⁶ *Bell*, *supra*, 275, citing *McCline*, *supra*, 134, n 10.

¹⁷ *Id.*

¹⁸ The record is silent regarding the reason for the substitution.

¹⁹ *Aldrich*, *supra* at 124.

²⁰ CJI2d 16.4.

²¹ CJI2d 16.5.

presented the issues for trial and sufficiently protected defendant's rights. The fact that the jury returned a verdict before the trial court responded to its request for clarification does not negate the fact that the jury was properly instructed on the elements of the charged offenses.

We also reject defendant's contention that he was prejudiced by the lack of record certification of Judge Waterstone's familiarity with the record pursuant to MCR 6.440(A). Judge Waterstone's participation in defendant's case was minimal. The jury's request for clarification of the difference between first- and second-degree murder involved a purely legal issue. Thus, Judge Waterstone was not required to exercise judgment, apply legal knowledge to, or deliberate about facts known only to the original judge. Defendant suffered no prejudice as a result of the lack of compliance with MCR 6.440(A), and therefore, any error was harmless.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper